IN THE COURT OF APPEALS OF TENNESSEE
AT Nashville
March 24, 2009 Session

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER) v. TENNESSEE WATER QUALITY CONTROL BOARD, ET AL.

Direct Appeal from the Chancery Court for Davidson County
No. 07-1136-II Carol C. McCoy, Chancellor

No. M2008-01567-COA-R3-CV - Filed June 10, 2009

Upon review under the Uniform Administrative Procedures Act, the trial court affirmed the decision of the Water Quality Control Board upholding the decision of the Tennessee Department of Environment and Conservation to approve Waste Management's application for a permit to expand a landfill into a mitigation wetlands area. Petitioner appeals. We dismiss the appeal for lack of standing and as moot.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Elizabeth Murphy, Nashville, Tennessee, for the appellant, Public Employees for Environmental Responsibility.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General and Sohnia W. Hong, Senior Counsel, for the appellee, State of Tennessee, Department of Environment and Conservation.

John P. Williams, Nashville, Tennessee for the appellee, Waste Management, Inc. of Tennessee.

OPINION

This lawsuit concerns the expansion of the Southern Services Landfill ("the landfill"), a construction and demolition waste landfill that was opened in 1974 in northwest Davidson County on the north bank of the Cumberland River. The landfill formerly was owned and operated by Southern Services, L.P. ("Southern Services") and was acquired by Waste Management, Inc. ("Waste Management") in 1998. The current dispute concerns the relocation of a portion of an intermittent, unnamed stream that flows into the Cumberland River, and the filling-in of approximately 1.25 acres of "mitigation wetlands" created in conjunction with an Aquatic Resource

Alteration Permit("ARAP") issued in 1994. The expansion area is located within the boundaries of the existing landfill, a portion of which is in an area that formerly included a Tennessee Valley Authority ("TVA") easement that once contained power lines.[1] The lawsuit largely revolves around the requirements of rules of the Tennessee Department of Environment and Conservation ("the TDEC"), Water Quality Control Board, Division of Water Pollution Control ("the Board") as promulgated by chapter 1200-4-7 of the Tennessee Administrative Code ("the Rules") pursuant to Tennessee Code Annotated §§ 69-3-105 and 108. The dispute concerns the validity a "§401 Water Quality Certification" ("the certification" or "the permit) issued by the TDEC under 33 U.S.C. § 401.[2]

In 1994, the TDEC issued Southern Services a permit to fill-in approximately nine acres of wetlands to expand the landfill. The 1994 permit required Southern Services to construct 20.6 acres of mitigation wetlands contiguous to the landfill in an area south of the TVA easement, which bisects the landfill. The permit provided that the State of Tennessee reserved the right to modify or revoke the permit for failure to comply with the permit terms. In July 1994, the TDEC issued a "Notice of Determination." Comment five of the Notice stated that no conservation easement had been proposed. It also stated, however, that Southern Services had "executed a deed restriction on the property on which the mitigation wetland [was] to be developed" which contained "the same restrictive covenants as the conservation easement[.]" Southern Services posted a bond in the amount of approximately $31,000, and the Declaration of Restrictions was recorded with the Register of Deeds. The Declaration provided, in pertinent part, that there would be no disruption or manipulation of the flow of any water body except as provided in the approved mitigation plan. It also provided that the restrictions "may be waived, amended, modified, released or terminated at any time and from time to time by Declarant upon the written consent of the Department." The permit expired on October 1, 1999.

The mitigation construction project was completed in 2000. According to the final monitoring report submitted by Civil & Environmental Consultants, Inc., the mitigation project was successful. The report concluded that the "entire wetland mitigation area has stabilized with native vegetation and waterfowl and wildlife are utilizing the site as intended. . . . All permit conditions have been met[.]"

In May 2003, Waste Management presented a proposal to expand the landfill within the landfill boundaries to the Metro Solid Waste Board, which approved it unanimously. In June 2003, Waste Management submitted applications to the TDEC and the Army Corps of Engineers for a permit to expand the landfill. In its application, Waste Management proposed to relocate approximately 2,242 linear feet of the unnamed stream and to fill-in approximately 1.25 acres at the edge of the mitigation wetlands area created under the 1994 permit. The proposed plan also created approximately 6.25 acres of new wetlands adjacent to the 1994 mitigation area. Under the plan, the

[1] The power lines subsequently were relocated.

[2] The Federal Clean Water Act.

wetlands increased from 18.30 acres to 23.3 acres. The plan as modified in January 2004 ultimately provided for 20.6 acres of wetland. In order to compensate for the relocation of the unnamed stream, Waste Management proposed rerouting the stream into a new channel of comparable size and gradient and approximately 2,283 feet in length. In the support documentation submitted with its permit application, Waste Management referenced the 1994 Declaration of Restrictions and the provision that the Declaration could be modified with the written consent of the TDEC.

The Army Corps of Engineers and the State of Tennessee jointly issued a public notice of Waste Management's permit application in November 2003.[3] In January 2004, the TDEC issued a "Section 401Certification" allowing Waste Management's proposed expansion. A corresponding "Section 404 Certification" was issued by the Army Corps of Engineers in June 2004.[4] In September 2005, the TDEC, Division of Water Pollution Control, issued a public notice describing the permit and stating that, although Waste Management had referenced the 1994 Declaration of Restrictions in its application, the TDEC inadvertently had failed to consider the Declaration in its review process. The declared purpose of the notice was "to advise all concerned that the division intends to issue its written consent allowing the proposed modification" to the Declaration as proposed by Waste Management and to solicit comments and information. The notice advised that the comment period would expire on October 15, 2005, and that a hearing would be held if warranted by sufficient public interest in accordance with Rule 1200-4-7-.04(4)(f).

On October 11, 2005, Petitioners Bordeaux Beautiful, Inc. ("Bordeaux Beautiful) and Public Employees for Environmental Responsibility ("PEER") filed a Petition for Hearing and/or Declaratory Order with the Water Quality Control Board of the TDEC ("the Board"). The petition was submitted by Barry Sulkin (Mr. Sulkin), Director, Tennessee PEER, and Chris Utley, President,

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[3] The Rules provide, in relevant part:

> An ARAP Individual Permit or a §401 Certification requires the issuance of Public Notice seeking public participation and comment on the planned activity. . . .
>
> . . . . The Department's procedure for issuing public notice for certification of an application for a federal license or permit pursuant to §401 of the Clean Water Act may be either a public notice issued jointly with the [Army] Corps [of Engineers], or a public notice issued by the Department.

Tenn. Comp. R. & Regs. 1200-4-7-.04(4)(a).

[4] A § 401 Water Quality Certification is one type of Aquatic Resource Alteration Permit ("ARAP"), and was the certification issued by the TDEC in 2004. A § 401 Certification is required where the waters involved are also waters of the United States. The rules pertaining to the two remaining State ARAPs - the individual permit and the general permit - are not at issue in the case. As described by the TDEC in the trial court,

> [a] § 401 Certification is an ARAP in which TDEC certifies to the [Army] Corps [of Engineers] that the proposed activity meets federal and state laws. . . . a § 401 Certification is one requirement that the applicant needs in order to receive the § 404 permit from the Corps that authorizes the work because the proposed activity impacts waters of the United States.

Bordeaux Beautiful, Inc. ("Bordeaux Beautiful"), and 11 individuals, including Mr. Sulkin.[5] The petition was amended in September 2006. The amended petition named Bordeaux Beautiful and PEER as petitioners (collectively, "Petitioners"). In their petition, Petitioners challenged the certifications granted by both the Army Corps of Engineers and the TDEC. They alleged the TDEC certification violated the 1994 TDEC permit and certification; state rules and regulations regarding public notice; the Tennessee Water Control Quality Act; state rules and regulations for wetland and stream mitigation, and federal law. Petitioners asserted that they were affected, aggrieved, and adversely impacted by the direct, secondary and cumulative impacts of the activities authorized by the 2004 permit because they live in the area of the proposed wetland fill and stream relocation and use and enjoy the local environment and water resources. Petitioners prayed for the permit to be stayed pending a final decision and "request[ed] injunctive relief so as to prevent further activity pending resolution of this matter." At its meeting on October 25, 2005, the Board agreed to convene a contested case proceeding.

Waste Management's petition to intervene was granted in January 2006. In April 2006, Petitioners filed a "Notice of Clarification of Parties" in which they stated that all individual citizens had withdrawn from the litigation after determining that their interests were adequately represented by Bordeaux Beautiful and PEER, and that Bordeaux Beautiful and PEER were the only remaining Petitioners. In June 2006, the TDEC and Waste Management filed motions to compel responses to their discovery requests. In its motion, the TDEC asserted that Petitioners had failed to provide evidence that they had responded to the public notices regarding the proposed permits. Waste Management asserted that PEER had failed to comply with its requests for membership information. In its accompanying memorandum of law, Waste Management asserted that PEER had supplied the names of only two members who lived at the same address near the landfill, and that neither was a public employee. It further asserted that PEER was a non-profit organization incorporated in the District of Columbia, that it registered to do business in Tennessee in 1999, and that its agent in Tennessee, Mr. Sulkin, was not a public employee. The Board granted the TDEC's motion to compel on June 26. Waste Management withdrew its motion to compel discovery of PEER's membership list in August 2006. On August 23, the Board entered an order vacating its order to compel of June 26 upon agreement of the parties. In its August order, the Board stated that the TDEC "reserve[d] the right to contest standing on the part of PEER at the time of the hearing before the Water Board."

In September 2006, the TDEC filed a motion styled "Motion for Special Board Instruction" in which it advised the Board that Petitioners carried the burden to demonstrate that they had standing to challenge the permit. It also filed a trial memorandum denying Petitioners allegations. Also in September 2006, Waste Management filed a brief denying Petitioners' allegations. In its brief, Waste Management also questioned Petitioners' right to appeal the TDEC's issuance of the 2004 certification on the grounds that, until the Water Quality Control Act was amended in 2005,

[5] Mr. Sulkin signed the petition twice, once in his capacity as Direction of Tennessee PEER and once in his individual capacity.

an opponent of a permit did not have the right to appeal the TDEC's decision to issue a permit under the Act.

Following several continuances, on October 23, 2006, the Board scheduled the matter to be heard on November 14-15. On November 13, Petitioners moved for the recusal of Board member Jim Haynes from the proceedings on the grounds that he was employed by the TDEC and was the Commissioner's appointee to the Board. Ken Pointer (Mr. Pointer) was substituted for Jim Haynes without objection. In their amended petition for recusal, filed in January 2007, Petitioners asserted Mr. Pointer should be recused because he was a contracted employee of the TDEC and previously had served as the TDEC Enforcement Coordinator.

The Board heard the matter over four days in November and December 2006 and January 2007 under the Uniform Administrative Procedures Act ("UAPA") contested case procedures. At the outset of the hearing, counsel for PEER stated

> [t]he issues in this case, basically, boil down to three topics. The first topic is notice; the second topic is the issuance of the ARAP [permit] itself and whether it was valid or whether it violates regulations that have been promulgated by this Board; and the third issue is whether the ARAP that's proposed from 2004 would cause a condition of pollution were it granted.

The Board entered its order upholding the permit on March 20, 2007. In its order, the Board made particularized findings regarding the background of the dispute and concluded that Petitioners had failed to carry their burden of proof as to whether the State had failed to comply with notice regulations; that the State had validly issued the certification to Waste Management; that the proposed activities permitted by the 2004 certification do not cause a condition of pollution. The Board also ordered the TDEC to hold a public hearing regarding the Declaration of Restrictions as referenced in its public notice of September 2005.

On May 18, 2007, PEER filed a petition for review in the Chancery Court for Davidson County pursuant to Tennessee Code Annotated § 4-5-322.[6] In its petition, PEER asserted that the Board's order should be reversed because the Board failed to make findings of fact regarding whether or how the content of the public notice was sufficient, including findings regarding the restrictive covenant, to support its conclusion of law. PEER also asserted that the Board failed to make findings regarding the method of delivery of the 2004 permit; that the Board failed to make findings regarding the contents and requirements of the 1994 permit terms; and that the Board failed to make findings of fact with regard to how the agency interpreted the 1994 permit. PEER further asserted that the Board made no findings to support its conclusion that the 2004 permit would not create a condition of pollution. PEER asserted that the Board's determinations accordingly were arbitrary and capricious and not supported by the evidence. PEER additionally appealed the Board's

[6] Bordeaux Beautiful did not petition for review and was dismissed by agreed order entered by the trial court on July 23, 2007.

decision denying its motion to recuse Mr. Pointer. Following a hearing in December 2007, on June 16, 2008, the trial court entered judgment upholding the Board's decision. PEER filed a timely notice of appeal to this Court.

Oral argument was heard by the Western Section of this Court sitting in Nashville on March 21, 2009. At oral argument, we instructed the parties to brief this Court with respect to the question of standing. Appellees, the TDEC/the Board (hereinafter, collectively, "the State") and Waste Management filed their briefs on April 3, 2009, and PEER filed its responsive brief on April 13, 2009. On April 3, 2009, the State filed a motion for consideration of post-judgment facts. The State asserted the matter had become moot where the TDEC modified the § 401 Certification on September 4, 2007, and consented to a modification of the Declaration of Restrictions and where Waste Management had completed the activities authorized by the § 401 Certification. The State also noted that the § 401 Certification expired on January 27, 2009. The State additionally asserted that PEER had never sought a stay of the Board's order in the trial court or in this Court. In its response brief, PEER stated,

> [t]he Appellate Court has already heard during oral argument that work has been completed at the wetlands . . . . Appellant has no objection to the post-judgment facts.

We granted the State's motion by Order filed May 22, 2009.

Issues Presented

PEER has raised the following issues for our review:

1. Did the Trial Court err i[n] upholding the Water Board decision that the 2004 permit No. 03-246 was 'validly issued' in January, 2004 where the admitted pre-requisite of a "written consent" from the Division of Water Pollution Control to waive restrictive covenants prohibiting the new permit activities had never been prepared, a second public comment period had been opened and Department Rule 1200-4-7-.04 (6) would apply under the facts to prohibit modifying the restrictive covenants after the wetlands were established and functional.

2. Did the Trial Court err in upholding the Water Board decision that the 2004 permit No. 03-246 would not create a condition of pollution where the Board included no findings of fact on the lengthy technical testimony, the facts supported the opposite conclusion and the Trial Court substituted its own assessment of the record, without support from or citation to the record.

3. Did the Trial Court err in upholding the Water Board's interpretation of Department Rule 1200-4-7-.04 (4) (a) - (f) relating to delivery of notice for

public participation such that the interpretation effectively allowed the Department to elect to follow U.S. Army Corps of Engineer public notice rules which differed substantially and did not contain requirements for newspaper ads, web posting, signage at the site and mailing to persons on the state "interested persons" list.

4. Did the Trial Court err in supporting the refusal of a Board Member to recuse himself for bias upon showing that he was a long time employee of TDEC, retired and returned on a paid, contract basis for undisclosed projects with the same Department that issued the permit being challenged, was in a position of authority in the Department, and referred to himself and the Department collectively during deliberations and argued consistently for votes upholding the legality of all Department actions.

Analysis

Before addressing the issues presented, we are required to first determine whether this Court has subject matter jurisdiction to adjudicate this matter. Tenn. R. App. P. 13(b)(2008). Subject matter jurisdiction concerns the "authority of a court to adjudicate a controversy brought before it[.]" *Haley v. Univ. of Tennessee at Knoxville*, 188 S.W.3d 518, 522 (Tenn. 2006)(quoting *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977) (citation omitted)). It "is conferred by the constitution and statutes[.]" *Id.* Subject matter jurisdiction may be raised by the courts *sua sponte*. Tenn. R. App. P. 13(b); *Ruff v. State*, 978 S.W.2d 95, 98 (Tenn.1998). Subject matter jurisdiction cannot be waived. *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 639 (Tenn.1996).

As noted above, at oral argument of this matter this Court instructed the parties to brief the matter of standing. In its brief, PEER asserts the question of standing was not raised in the trial court and should not be addressed for the first time on appeal. It asserts the State waived the issue of standing by failing to raise it in the trial court. PEER also asserts that, although Waste Management initially sought PEER's membership list in the proceedings before the Board, Waste Management abandoned this discovery request. PEER further asserts that Waste Management sought its membership list in order to challenge PEER's "credibility" and not its standing. PEER additionally submits that the TDEC failed to raise the issue of standing before the Board, during judicial review in the trial court, or in this Court. It asserts that, because "PEER does not post a constitutional challenge where standing and subject matter jurisdiction are inextricably combined," the issue must therefore be considered waived. We disagree.

The Tennessee Supreme Court has held that the question of standing is "interwoven" with the question of subject matter jurisdiction "[w]hen a statute creates a cause of action and designates who may bring [the] action[.]" *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004)(citation omitted). In such cases, the determination of standing "becomes a jurisdictional prerequisite." *Id.* Because, as PEER asserts in its brief, it is "before the court under statutory authority as an 'aggrieved

party'" under Tennessee Code Annotated § 69-3-105, we must consider the issue of standing as a jurisdictional matter.

Additionally, having granted the States' motion to consider post-judgment facts, we must also determine whether the issues raised by PEER on appeal have become moot. "[A] court only exercises its 'jurisdiction' when it is called upon to 'adjudicate a controversy.'" *Haley v. Univ. of Tennessee at Knoxville*, 188 S.W.3d 519, 522(Tenn. 2006) (quoting *Kane v. Kane,* 547 S.W.2d 559, 560 (Tenn. 1977)). "To 'adjudicate' is not simply to render a decision or an opinion. To 'adjudicate' means '[t]o settle in the exercise of judicial authority. To *determine finally*.'" *Id.* (quoting Black's Law Dictionary 42 (6th ed.1990) (emphasis added)).

In order to retain its character as a justiciable controversy to be adjudicated by the court, the controversy must remain alive throughout the course of litigation, including the appeal process. *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). Subject to limited exceptional conditions, the doctrine of justiciability encourages the appellate courts to decline to address appeals that do not involve a genuine and live controversy that requires "the present adjudication as involving present rights." *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961)(quoting *Southern Pac. Co. v. Eshelman*, 227 F. 928, 932 (D.C. Cal. 1914)); *McIntyre*, 884 S.W.2d at 137. This Court will not render advisory opinions or "decide abstract legal questions." *Id.* (citations omitted).

A lawsuit that no longer requires the adjudication of the parties' rights is not justiciable and will be considered moot. *McIntyre*, 884 S.W.2d at 137. The court's primary consideration when determining whether a lawsuit has become moot "is whether changes in the circumstances existing at the beginning of the litigation have forestalled the need for meaningful relief." *Id.* (quoting Federal Practice and Procedure § 3533.3, at 261). Thus, we generally will consider a case to be moot "if it no longer serves as a means to provide relief to the prevailing party." *Id.* The question of whether an action has become moot is a question of law to be decided by the court. *Hurd v. Flores*, 221 S.W.3d 14, 30 (Tenn. Ct. App. 2006).

As noted above, Waste Management already has completed the activities permitted by the § 401 Certification at issue in this case. Although PEER asserts the case is not moot because the question of the TDEC's notice procedures remains in controversy, this appeal does not involve the adjudication of the parties' present rights. We agree with the State that this lawsuit has been rendered moot. PEER, however, submits that the issues raised on appeal nevertheless should be decided by this court because they fall into exceptions to the mootness doctrine where they involve matters of great public importance and because they comprise a circumstance capable of repetition yet escaping review. We thus turn to whether PEER has standing to bring this action and to whether this case falls into one of the exceptions to the mootness doctrine.

Standing

In its brief to this Court, PEER asserts it has standing as an aggrieved person because its member and Tennessee director, Mr. Sulkin, is directly affected by the activities in the landfill. It relies on *Federal Election Commission v. Atkins*, 524 U.S. 11 (1998), *Chattanooga Railway and Light Co. v. Bettis*, 139 Tenn. 332 (1918), and *Brentwood v. Metropolitan Board of Zoning*, 149 S.W.3d 49 (Tenn. Ct. App. 2004), for the proposition that PEER has standing where Mr. Sulkin has a "distinct and palpable injury to a recognized legal right or interest," and that "its claim falls within the zone of interests protected or regulated by the statute or rule in question." The briefs of Waste Management and the TDEC likewise focus on whether the record demonstrates that Mr. Sulkin suffered a distinct and palpable injury sufficient for PEER to assert standing on the basis of an injury to its members.

Although we agree with PEER that the record contains evidence to demonstrate that Mr. Sulkin has suffered an injury sufficiently distinct and palpable to assert standing under the standards proffered by the parties, we turn to whether PEER has standing under the statute that creates the right of review by the Board. Tennessee Code Annotated § 69-3-105 defines the duties and authority of the Board. The statute as it existed when PEER and Bordeaux Beautiful filed their petition for declaratory order in 2005 provided, in relevant part:

> (f)(1) The board has and shall exercise the power, duty, and responsibility to:
> (A) Hear appeals from orders issued and penalties or damages assessed by the commissioner, or permit revocations or modifications by the commissioner;
> (B) Affirm, modify, or revoke such actions or orders of the commissioner;
> (C) Issue notices of such appeals and subpoenas requiring attendance of witnesses and the production of evidence;
> (D) Administer oaths; and
> (E) Take such testimony as the board deems necessary.

Tenn. Code Ann. § 69-3-105(f)(1)(2004).[7]

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[7] Tennessee Code Annotated § 69-3-105(f)(1)(a) was amended in 2007 by Acts 2007, ch. 362, § 45. It currently provides:

> (f)(1) The board has and shall exercise the power, duty, and responsibility to:
> (A) Hear appeals from orders issued and penalties or damages assessed by the commissioner, or permit issuances, denials, revocations or modifications by the commissioner[.]

Tennessee Code Annotated § § 69-3-105(f)(1)(a)(Supp. 2008).

The statute further provided:

> (i) Upon receiving a petition for permit appeal, the board has the power, duty, and responsibility to hold a contested case hearing concerning the commissioner's issuance or denial of a permit. During this hearing, the board shall review the commissioner's permit decision and may reverse or modify the decision upon finding that it does not comply with any provisions of this part. A petition for permit appeal may be filed, pursuant to this subsection (i), by the permit applicant or by any aggrieved person who participated in the public comment period or gave testimony at a formal public hearing whose appeal is based upon any of the issues that were provided to the commissioner in writing during the public comment period or in testimony at a formal public hearing on the permit application. Additionally, for those permits for which the department gives public notice of a draft permit, any permit applicant or aggrieved person may base a permit appeal on any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment. Any petition for permit appeal under this subsection (I) shall be filed with the board within thirty (30) days after public notice of the commissioner's decision to issue or deny the permit. Notwithstanding the provisions of §§ 4-5-223 or 69-3-118(a), or any other provision of law to the contrary, this subsection (I) and the established procedures of Tennessee's antidegradation statement, found in the rules promulgated by the department, shall be the exclusive means for obtaining administrative review of the commissioner's issuance or denial of a permit.

Tennessee Code Annotated § 69-3-105(i)(Supp. 2008). Although this subsection was effective in October 2005, when PEER's petition was filed with the Board, it applies only to permit applications filed after June 7, 2005, its effective date. Tenn. Code Ann. § 69-3-105(i)(Supp. 2008) compiler's notes; 2005 Acts, ch. 355, §2. Accordingly, because Waste Management filed its permit application prior to June 7, 2005, the statutory section is not applicable to its permit. Rather, Waste Management's permit was within the purview of the prior version of the subsection, which provided, in relevant part:

> The board has and shall exercise the power, duty, and responsibility to hold hearings where requested by the permittee or applicant for the purpose of reviewing the denial or imposition of terms or conditions in permits or variances by the commissioner.

Tennessee Code Annotated 69-3-105(i)(1)(2004).

PEER filed its "Petition for Hearing and/or Declaratory Order" pursuant to Tennessee Code Annotated § 4-5-223 and Tennessee Administrative Code 1360-4-1-.07. The statutory section provides:

> (a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency. The agency shall:
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> (1) Convene a contested case hearing pursuant to the provisions of this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or
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> (2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in § 4-5-225.
>
> (b) A declaratory order shall be binding between the agency and parties on the state of facts alleged in the petition unless it is altered or set aside by the agency or a court in a proper proceeding.
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> (c) If an agency has not set a petition for a declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order.
>
> (d) Each agency shall prescribe by rule the form of such petitions and the procedure for their submission, consideration and disposition.

Tenn. Code Ann. § 4-5-223(2005). The section "specifically allows an aggrieved party to petition for a declaratory order challenging the 'validity or applicability of a statute, rule or order within the primary jurisdiction of the agency.'" *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 844 (Tenn. 2008).[8] The Administrative Code provides:

> (1) Any affected person may petition an agency for a declaratory order as to the validity or the applicability of a statute, rule or order within the primary jurisdiction of the agency.
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> (2) The petition seeking a declaratory order shall be filed in writing with the agency.
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> (3) The form of such petitions shall be substantially as follows:
>
> . . . .
>
> (4) In the event the agency convenes a contested case hearing pursuant to this rule and T.C.A. § 4-5-223, then the Administrative Procedures Division shall be notified immediately and shall be provided originals or legible copies of all pleadings, motions, objections, etc.

[8] The *Colonial* court held that, notwithstanding the statutes, an administrative agency does not have authority to determine the constitutional validity of a statute. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 844-45 (Tenn. 2008).

Tenn. Comp. R. & Regs. 1360-4-1-.07. The Administrative Code chapter applicable to "aquatic resource alteration" provides:

> This regulation prescribes procedures peculiar to these permits, in addition to the general requirements and procedures of Chapter 1200-4-1 of the Rules of the Water Quality Control Board and the Department of Environment and Conservation, and the Tennessee Water Quality Control Act of 1977.

Tenn. Comp. R. & Regs. 1200-4-7-.01(4). The chapter also provides procedures for public notice, comment and hearings, and for review of permit denials, suspensions, revocations, terms and conditions. It provides:

> Permittees and applicants for permits who disagree with the denial, suspension or revocation of a permit or the terms and conditions of a permit are entitled to review of the Commissioner's decision by the Water Quality Control Board pursuant to § 69-3-105.

Tenn. Comp. R. & Regs. 1200-4-7-.04(9).

The interpretation of a statute, municipal ordinance or rule is a question of law to be decided by the court. *Amos v. Metro. Gov't of Nashville and Davidson County*, 259 S.W.3d 705, 710 (Tenn. 2008)(citation omitted). "[W]here the mind of the legislature has been turned to the details of a subject and they have acted upon it, a statute treating the subject in a general manner should not be considered as intended to affect the more particular provision." *Arnwine v. Union County Bd. of Educ.*, 120 S.W.3d 804, 809 (Tenn. 2003)(quoting *Woodroof v. City of Nashville*, 192 S.W.2d 1013, 1015 (Tenn. 1946)). Thus, the provisions of a specific statute will control over conflicting provisions in a general statute. *Id.*

PEER arguably is an "affected person" for the purposes of standing under the general Declaratory Order Statute as codified at Tennessee Code Annotated § 4-5-223.[9] However, under the more limited and specific statutory section applicable to the Board's review of a permit applied for prior to June 7, 2005, PEER did not have standing to bring its petition for review before the Board. Put otherwise, the Board was not empowered to hear PEER's appeal of the Commissioner's issuance of Waste Management's permit. Under Tennessee Code Annotated § 69-3-105 as applicable to permits applied for prior to June 7, 2005, and under the administrative rules and regulations, PEER did not have standing to appeal the issuance of Waste Management's permit to the Board where PEER was neither a permittee nor an applicant, and where the hearing concerned neither a statute, rule or order, nor a permit denial, revocation or modification.

[9] We note that any hearing held before the Board pursuant to Tennessee Code Annotated § 4-5-223 must be conducted in accordance with the contested case procedures prescribed by the Uniform Administrative Procedures Act as codified at Tennessee Code Annotated § 4-5-301, *et seq.* Tenn. Code Ann. § 69-3-110(2004).

We recognize that the statutory scheme arguably formerly contained a hole or loophole with respect to a challenge to or appeal of the issuance of a permit before the Board by an aggrieved party who was not a permittee or applicant.[10] We also observe that the legislature has recognized and closed this hole in Tennessee Code Annotated § 69-3-105(i) as amended in 2005. In the amended section, the general assembly has further defined the parameters of an "aggrieved person" for the purposes of the section. This more limited definition of an aggrieved person, in combination with the enactment of the amendment by the general assembly, reinforces our holding here that the general assembly intends that the specific provisions contained in Tennessee Code Annotated § 69-3-105 shall control who may petition for a hearing before the Board. Additionally, the general assembly specifically limited the 2005 amendment to permits that were applied for subsequent to the effective date of the amendment, June 7, 2005.

Exceptions to Mootness Doctrine

As noted above, in addition to asserting that it had standing to seek a declaratory order from the Board, PEER asserts that the issues raised in the appeal should be excepted from the mootness doctrine. We begin our consideration of PEER's argument by noting that the mootness doctrine is not easily overcome. *See State ex rel. Lewis v. State*, 347 S.W.2d 47 (Tenn. 1961). The *Lewis* court stated:

> The best statement of the question herein involved that we have found was made in *Southern Pac. Co. v. Eshelman*, as reported in D.C., 227 F. 928, 932. That court said:
>
> > "However convenient or desirable for either party that the questions mooted in the case be authoritatively settled for future guidance, the court is not justified in violating fundamental principles of judicial procedure to gratify that desire. To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although the case may have originally presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it."
>
> A number of authorities are therein cited, all of which are various and sundry United States Supreme Court decisions, including *State of Tennessee v. Condon*, 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 790.

[10] In light of the statutory amendment, it is unnecessary for us to address whether an action may have been brought as a declaratory judgment action under the former statute.

> The above quoted statement of the court in that case is practically and to all intents and purposes a copy of a statement made in 2 Encyc. Sup. Ct.R., 289.
>
> We in this State have consistently followed this principle. The courts of this State have no right to render an advisory opinion. They do so render advisory opinions in some States, but we do not. We have repeatedly held that where only the taxing of the costs is involved and the major question has become moot that we will not consider the question. *State ex rel. Wilson v. Bush*, 141 Tenn. 229, 208 S.W. 607. . . . We have held likewise in various and sundry declaratory judgment suits where the question has become merely abstract and theoretical, such as *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S.W. 901; *Nashville Trust Co. v. Dake*, 162 Tenn. 356, 36 S.W.2d 905; and in *United States Fidelity & Guaranty Co. v. Askew*, 183 Tenn. 209, 191 S.W.2d 533, this Court held again that a declaratory judgment case would not be considered when the question presented is abstract, theoretical or based on a contingency which may or may not arise.

Id. at 48-49.

Tennessee courts have recognized exceptions to the mootness doctrine, however. The two most common exceptions involve issues of great public interest and importance to the administration of justice, and issues that are capable of repetition yet evading review. *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. App. 1994)(citations omitted). The courts often combine these exceptions. *Id.* The courts are inclined to address questions that involve "a determination of public rights or interests under conditions which may be repeated in the future." *See Walker v. Dunn*, 498 S.W.2d 102, 104 (Tenn. 1973). The determination of whether to consider a case that fits into an exception to the mootness doctrine is within the discretion of the appellate court. *McIntyre*, 884 S.W.2d at 137.

Although environmental concerns and maintaining the quality of Tennessee's water and wetlands are matters of great public importance, we are not convinced that the circumstances of this litigation justify considering the issues raised despite the fact that they are now moot. Even if we assume PEER had standing to seek a declaratory order from the Board, PEER did not avail itself of the judicial mechanisms available to it to prevent this case from becoming moot during the appellate process. Specifically, although PEER requested a stay by the Board at the outset of this dispute, PEER did not seek an injunction in the trial court enjoining Waste Management from proceeding with activities governed by the permit pending the outcome of this action. The Board issued its order in March 2007, and PEER filed its petition for review in the chancery court in May 2007. The Board ordered the TDEC to hold hearings on the proposed modification to the Declaration of Restrictions, and the TDEC did not modify the Declaration until September 2007. PEER had ample opportunity to seek an injunction during this time.

We are not insensitive to PEER's assertion that the bond required for temporary injunctive relief likely would have been costly, although PEER does not define "cost prohibitive." Additionally, PEER's assertion in its brief to this Court that a motion for a temporary injunction was

unlikely to be successful in light of the Board's determination may well be correct. PEER's argument professes little faith in its position, however, and does not relieve PEER from the obligation of seeking the relief necessary to prevent the lawsuit from becoming moot.

We note that this litigation is governed by the Uniform Administrative Procedures Act as codified at Tennessee Code Annotated § 4-5-101, *et seq*. The exhaustion of remedies doctrine has been adopted implicitly by the general assembly in the UAPA. *See* Tennessee Code Annotated § 4-5-225(b)(2005); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 845 (Tenn. 2008)(creating exception to the statute in actions challenging the facial constitutional validity of a statute and stating, "[o]ur ruling today is meant to achieve harmony between the UAPA, the exhaustion of remedies doctrine, and the separation of powers clause."). In this case, we are disinclined to address the issues raised by PEER where PEER did not avail itself of the opportunity to prevent its action from becoming moot. PEER's protest that an injunction would have been expensive and/or unlikely does not excuse it from seeking every available judicial remedy to protect its asserted interests in this case.

Holding

In light of the foregoing, this appeal is dismissed for lack of standing and on the grounds that it is moot. Costs of this appeal are taxed to the Appellant, Public Employees for Environmental Responsibility, and to its surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE